

BOARD OF COUNTY COMMISSIONERS

AGENDA ITEM SUMMARY

Meeting Date: June 21, 2006

Division: Budget & Finance

Bulk Item: Yes X No

Department: Office of Management & Budget

Department Contact: Tina Boan

AGENDA ITEM WORDING:

Approval to execute: a Sublicense Agreement with Bank of America, for the use of the Works Application. The Works application is used for access to the bank card/purchasing card subscriber's application through the use of an internet browser.

ITEM BACKGROUND:

This is the Bank of America's payment manager and/or card manager, the Works Application is to be used in conjunction with the purchasing cards issued by Bank of America.

PREVIOUS RELEVANT BOCC ACTION:

At the 3/15/06 meeting, the Board Approved an application with Bank of America for purchasing card services, at the 4/19/06 meeting the Board Approved the Purchasing Card Policies and Procedures.

CONTRACT/AGREEMENT CHANGES:

None.

STAFF RECOMMENDATIONS:

Approval

TOTAL COST: \$N/A

BUDGETED: Yes No N/A

COST TO COUNTY: \$ N/A

SOURCE OF FUNDS:

REVENUE PRODUCING: Yes No **AMOUNT PER MONTH** **Year**

APPROVED BY: County Atty *mx* OMB/Purchasing *BO* X Risk Management

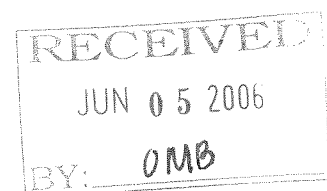
DIVISION DIRECTOR APPROVAL:

Salvatore R. Zappulla
Salvatore R. Zappulla

DOCUMENTATION: Included X To Follow Not Required

DISPOSITION:

AGENDA ITEM #



Works™ Service Sublicense Agreement

This Agreement for use of the Works™ Application (the "Agreement") is entered into between Bank of America, N.A., a national banking association ("Bank of America") and Company Name ("Subscriber"), with its principal office at City, State ("Subscriber"). The parties hereby agree as follows:

1. Definitions

1.1 "Affiliate" means any business entity now or hereafter controlled by, controlling or under common control with a Party. Control exists when an entity owns or controls, directly or indirectly, 50% or more of the outstanding equity representing the right to vote for the election of directors or other managing authority of the controlled entity.

1.2 "Application" means Works' Payment Manager and/or Card Manager, if applicable, to be implemented for Subscriber under Section 14 herein, as that Application may be modified in accordance with Section 4.

1.3 "Bank" means Bank of America, N.A. (USA).

1.4 "Card" means any commercial credit card (including purchasing and corporate credit cards) issued by Bank and that is used for purchases, including travel and entertainment and/or cash advances, and is managed by the Application.

1.5 "Confidential Information" means information in any form that a party knows or reasonably should know is the confidential, non-public information of the other party or its licensors or Affiliates. Without limiting the foregoing, Confidential Information shall include (a) the Application and all related documentation, and (b) all Personally Identifiable Information.

1.6 "Effective Date" means the date that this Agreement is signed by both parties.

1.7 "Macros" means any macro, file or script provided by Works to enable Subscriber to create files for importing into Subscriber's accounting system in connection with Subscriber's authorized use of the Application.

1.8 "Personally Identifiable Information" means any cardholder or company specific data created or obtained in connection with the use of Subscriber's Card accounts, including names, addresses, transactional data, Card numbers, credit limits, and any other personally identifying information.

1.9 "Term" means the time period beginning on the Effective Date and ending upon the effective date of any termination of this Agreement.

1.10 "Works" means Austin Acquisition, Inc. (operating under the name Works), owner and licensor of the Application.

2. Sublicense. Subject to the terms of this Agreement and only for the Term, Bank of America grants to Subscriber a limited, non-exclusive, non-transferable, non-sublicenseable, revocable sublicense to access and use the Application through the use of an Internet browser, and to use any Macros provided by Works, solely for the purpose of managing Subscriber's Card purchasing processes and not for the benefit of any third party. All rights not expressly granted hereunder are expressly reserved by Works.

3. Title. All title, ownership rights, and intellectual property rights in and to the Application, Macros, and any enhancements, improvements, derivative works or other modifications thereto, including without limitation any changes suggested or requested by Subscriber, are and shall remain at all times the sole property of Works. No proprietary or intellectual property rights transfer to Subscriber as a result of this Agreement.

4. Upgrades and Additional Offerings. The Application may be modified during the Term, including by adding, modifying or removing features at any time during the Term. Such changes may apply to all Application users or to groups of Application users.

5. Term and Termination.

5.1 This Agreement begins on the Effective Date and continues until terminated by either party by giving sixty (60) days prior written notice to the other party.

5.2 This Agreement will terminate automatically if Subscriber terminates its relationship with Bank.

5.3 Works may suspend Subscriber's access to the Application at any time without notice if Bank of America or Works reasonably believes that Subscriber has violated any material term of this Agreement.

6. Customer Support. Subscriber may obtain telephone technical support relating to its use of the Application by calling the number designated by Works, but specifically excluding support relating to implementation and reconfiguration of the Application ("Technical Support"). Technical Support is available Monday through Friday (excluding holidays) from 8 a.m. to 8 p.m. Eastern Standard Time. Technical Support inquiries may be placed only by either of two technical support contacts designated by Subscriber.

7. Subscriber's Relationship to Bank. The Application may only be used in conjunction with Cards issued by Bank. By using the Application, Subscriber authorizes Bank of America, Bank and Works to take such actions with respect to its Card accounts as are necessary to deliver the services under this Agreement. The credit relationship between Subscriber and Bank is subject to agreement(s) between Subscriber and Bank.

8. Confidentiality.

8.1 Each party ("Recipient") agrees to keep confidential and not disclose or use, except in performance of its obligations under this Agreement, any Confidential Information of the other party or its licensors or Affiliates ("Discloser"). To the extent reasonably required to perform its obligations under this Agreement, Recipient may use and disclose Confidential Information of Discloser internally, including with employees, consultants, contractors, and service providers who are bound by confidentiality obligations at least as restrictive as those stated herein. Bank of America represents that Works is bound by confidentiality restrictions at least as restrictive as those stated herein.

8.2 Notwithstanding Section 8.1 above, unless otherwise authorized by Subscriber, Bank of America will not use or disclose Personally Identifiable Information other than as follows, provided that at all times Bank of America complies with all applicable laws, regulations and its privacy and security policy provided to Subscriber: (i) to process Card transactions through the Application and to otherwise maintain and support Subscribers' Card accounts; (ii) to communicate with Subscriber regarding issues relating to the Application or Card transactions; (iii) for Bank of America's or Banks' internal business planning purposes; and (iv) to obtain services from third parties relating to the Application, provided that any such third party is bound by obligations prohibiting use by or disclosure to any third party of such Personally Identifiable Information.

8.3 Confidential Information does not include information that: (i) is or becomes generally known to the public through no fault or breach of this Agreement by Recipient; (ii) is rightfully known by Recipient at the time of disclosure by Discloser without an obligation of confidentiality; (iii) is independently developed by Recipient without use of or access to Discloser's Confidential Information; (iv) Recipient rightfully obtains from a third party without restriction on use or disclosure; or (v) is disclosed with the prior written approval of Discloser.

8.4 Recipient may disclose the Confidential Information of Discloser: (i) pursuant to the order or requirement of a court, administrative agency, or other governmental or law enforcement body having jurisdiction over Recipient, provided that Recipient gives Discloser prompt notice of any such order or requirement; or (ii) on a confidential basis to Recipient's legal, financial or security advisors.

8.5 Subject to Section 8.2 above, the parties agree that any data or information other than Personally Identifiable Information that relates in any manner to Card usage via the Application and that is acquired by Bank of America or Works in the course of the provision of the Application or services under this Agreement will belong equally to each party and to Works, and nothing in this Agreement shall prohibit either party or Works from disclosing or using such data or information in its aggregate form.

9. **No Warranty.** BANK OF AMERICA AND WORKS EXPRESSLY DISCLAIM ALL WARRANTIES OF ANY KIND, WHETHER STATUTORY, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, PERFORMANCE, ACCURACY, FUNCTIONALITY OR NONINFRINGEMENT. NEITHER Bank of America NOR WORKS MAKES ANY WARRANTY THAT: (i) USE OR OPERATION OF THE INTERNET SITE, THE APPLICATION OR ANY MACROS WILL BE UNINTERRUPTED, ERROR-FREE OR SECURE; OR (ii) LOSS OF DATA WILL NOT OCCUR; OR (iii) MESSAGES OR REQUESTS WILL BE DELIVERED IN A TIMELY FASHION; OR (iv) THE INFORMATION PROVIDED IN OR THROUGH THE APPLICATION IS ACCURATE, COMPLETE OR CURRENT. ANY MACROS PROVIDED BY WORKS ARE PROVIDED "AS IS" AND SUBSCRIBER ASSUMES ANY AND ALL RISKS ASSOCIATED WITH USE OF ANY MACROS.

10. **Limitation of Liability.**

10.1 NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY, REGARDLESS OF THE FORM OF THE ACTION AND WHETHER IN CONTRACT OR IN TORT (INCLUDING WITHOUT LIMITATION NEGLIGENCE, STRICT LIABILITY OR ANY OTHER LEGAL OR EQUITABLE CLAIM), FOR ANY PUNITIVE, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR OTHER INDIRECT DAMAGES, INCLUDING BUT NOT LIMITED TO DAMAGES FOR LOST PROFITS, BUSINESS INTERRUPTION OR DELAY, LOSS OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, EVEN IF THE OTHER PARTY HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES. ADDITIONALLY, THE AGGREGATE LIABILITY OF Bank of America TO SUBSCRIBER FOR ANY AND ALL LOSSES, DAMAGES, COSTS OR EXPENSES ARISING UNDER THIS AGREEMENT, REGARDLESS OF THE FORM OF THE ACTION AND WHETHER IN CONTRACT OR IN TORT (INCLUDING WITHOUT LIMITATION NEGLIGENCE, STRICT LIABILITY OR ANY OTHER LEGAL OR EQUITABLE CLAIM), WILL BE LIMITED TO DIRECT DAMAGES IN AN AMOUNT NOT TO EXCEED THE TOTAL FEES ACTUALLY PAID BY SUBSCRIBER TO Bank of America UNDER THIS AGREEMENT DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT WHICH GAVE RISE TO THE CLAIM. IN NO EVENT WILL WORKS BE LIABLE TO SUBSCRIBER, REGARDLESS OF THE FORM OF THE ACTION AND WHETHER IN CONTRACT OR IN TORT (INCLUDING WITHOUT LIMITATION NEGLIGENCE, STRICT LIABILITY OR ANY OTHER LEGAL OR EQUITABLE CLAIM), FOR ANY DAMAGES WHATSOEVER, INCLUDING BUT NOT LIMITED TO DIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, SPECIAL, OR OTHER DAMAGES, AND FURTHER INCLUDING BUT NOT LIMITED TO DAMAGES FOR LOST PROFITS, BUSINESS INTERRUPTION OR DELAY, LOSS OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, EVEN IF WORKS HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES.

10.2 NOTWITHSTANDING SECTION 10.1 ABOVE, IN NO EVENT WILL BANK OF AMERICA BE LIABLE TO SUBSCRIBER FOR ANY DAMAGES WHATSOEVER, WHETHER DIRECT, 733109.01

INDIRECT, SPECIAL, CONSEQUENTIAL OR OTHERWISE, ARISING OR RESULTING FROM: (A) MISTAKE, THEFT, FRAUD OR OTHER MISCONDUCT BY SUBSCRIBER, ITS EMPLOYEES OR AGENTS, OR BY ANY THIRD PARTY, IN CONNECTION WITH THE APPLICATION; OR (B) ANY USE OF ANY MACROS.

10.3 The parties expressly acknowledge and agree that Bank of America and Subscriber have entered into this Agreement in reliance upon the limitations of liability specified herein.

11. **Responsibility for Use of Subscriber's Account.**

11.1 Subscriber is solely responsible for all use of its Application account. Subscriber is responsible for maintaining the confidentiality of its passwords, account numbers and other information, and for appropriate segregation of duties for Application users. Subscriber agrees to keep its passwords and account numbers confidential, and to notify Bank of America and Works immediately if it learns that a password or account number has been compromised.

11.2 Subscriber will not, and will not permit any employee, agent or other third party to undertake any action intended to interfere with effective operation of the Application or violate any applicable law or regulation in connection with this Agreement. Subscriber will indemnify and hold harmless Bank of America, Bank and Works and their respective officers, directors, and employees from any claim or damage sustained as the result of any breach by Subscriber of this Section 11.2.

12. **Assignment.** Subscriber may not assign its rights or obligations under this Agreement without the prior written consent of Bank of America, which will not be unreasonably withheld. Any assignee of Subscriber must agree to be bound by the terms and conditions of this Agreement.

13. **Miscellaneous.** This Agreement is the complete agreement of the parties regarding the subject matter hereof and supercedes any prior oral or written agreements or representations. The failure by either party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that or any other provision. The non-performance of a party will be excused for the period of any delay caused by any force majeure event, including act of God, war, terrorism, or any other cause beyond the party's reasonable control. Except as otherwise provided herein, this Agreement may be amended only by a written amendment signed by authorized representatives of both parties. If any provision of this Agreement is held to be unenforceable, such provision will be reformed only to the extent necessary to make it enforceable. This Agreement will be governed by North Carolina law, excluding its conflict of laws principles. The exclusive forum and venue for any dispute arising under or in connection with this Agreement will be in any court of competent jurisdiction located in New York, New York, and the parties hereby consent and agree to submit to the general jurisdiction of any court in that venue. Signatures transmitted via facsimile shall have the same force and effect as the original. Each party to this Agreement is responsible for compliance with the Agreement by its employees and authorized agents. Works is a third party beneficiary of this Agreement.

14. **Implementation, Fees, Limited Warranty and Limitation of Liability for Implementation.**

14.1 Subscriber will be implemented as a user of the Application in accordance with Works' customary implementation procedures ("Implementation Services").

14.2 [OPTIONAL] Subscriber will pay Bank of America a non-refundable fee ("Implementation Fee") of thousand dollars (\$) for the Implementation Services described herein within thirty days of invoicing by Bank of America. Receipt by Bank of America of a purchase order for or payment of the Implementation Fee will entitle Subscriber to () hours of remote and on-site Implementation Services.

14.3 Notwithstanding the warranty disclaimer contained in Section 9 herein, Bank of America warrants that the Implementation Services will be performed in a good and workmanlike manner. SUBSCRIBER'S SOLE REMEDY FOR BREACH OF THE FOREGOING WARRANTY WILL BE THE REPROGRAMMING OF SUBSCRIBER'S APPLICATION ACCOUNT TO CORRECT ANY DEFECT RESULTING FROM SUCH BREACH. Bank of America WILL HAVE NO LIABILITY FOR IMPLEMENTATION DEFECTS RESULTING FROM CONDUCT OR DEFECTIVE INFORMATION PROVIDED BY SUBSCRIBER.

14.4 Subscriber will confirm that all Subscriber approval processes and Subscriber information (including purchasing rules, individual and group spending limits, approval routing requirements, and other specifications regarding Subscriber's account) are accurately and adequately included and implemented in the Application.

14.5 Subscriber authorizes Bank of America to be set up as a financial administrator in the Application by Works.

In witness whereof, each party has caused its duly authorized representative to execute this Agreement.

Licensor: Bank of America, N.A.

Subscriber: _____

By: _____

By: _____

Name: _____

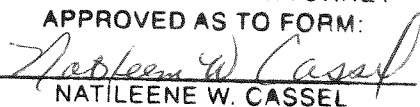
Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

MONROE COUNTY ATTORNEY
APPROVED AS TO FORM:

NATILEENE W. CASSEL
ASSISTANT COUNTY ATTORNEY
Date 6-2-06